

The European Commission acts against 20 member states for failing to implement its e-Privacy Directive. "As an industry, we need to move before the policy is set against us," warns COLIN O'MALLEY. "Better to build our own specifications than be told what to do".

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## Opportunity behind the 'menacing spectre'

**W**ithin the online advertising community, the cookie consent requirements of the e-Privacy Directive, as amended in 2009, have been a menacing spectre. But while headlines about the law have been steady and the general state of concern is rising, even lawyers following the law closely have had difficulty interpreting what it requires in practical terms.

While we don't yet have clarity on the minimum standard for cookies in the EU, we know that consent will be required in some new and more robust form and that, if we don't move the needle forward as an industry, regulators are likely to define it for us in detail. And no-one, certainly not consumers, will benefit from interfaces designed by regulators. While the Directive has passed through the European Parliament, it's not yet law in most member states. However, it's on the books in the single largest online advertising market in Europe, the UK, and appears to be in the process of implementation in a number of other countries.

What's more, the European Commission has repeatedly stated its intention to follow-up and to ensure that the law is passed and enforced across the Union. They mean business. In July,

they launched enforcement proceedings against 20 member states for failing to implement the Directive. From a practical business planning standpoint, online advertisers operating in the EU have no choice but to fold the Directive into their operational strategy. The biggest challenge in interpreting the law is learning how to gather consent from consumers for cookie use (or other tracking technologies). To be clear, the law applies to cookies used for 3rd party behavioural advertising, but it also includes cookies used for other purposes, including analytics, optimisation, attribution, and virtually any other cookie used for ad-related purposes.

The scope is wide enough to implicate every site and every ad delivered in the EU. The law does not specify "prior consent," and we're in the midst of a high stakes debate between industry, data protection authorities, and sometimes within governments themselves on whether consent can be implied or must be explicit:

**"Browser settings"**: The UK Department of Culture Media and Sport (DCMS) says browser settings are sufficient: *ref:* [http://www.dcms.gov.uk/images/publications/cookies\\_open\\_letter.pdf](http://www.dcms.gov.uk/images/publications/cookies_open_letter.pdf)

**"Prior consent"**: The UK Information Commissioner's Office (ICO) suggests that prior consent is necessary.

That's the context. So what's a marketer to do? The first step is admitting that you have a law to deal with, and it's not going away.



# Cookie consents

## TELLING TECHNIQUES

The second step is formulating your action plan. While we don't know exactly what form enhanced notice must take to satisfy regulators, they have made it abundantly clear in multiple jurisdictions that the status quo will not suffice. They want to see substantive and good faith innovation, and new levels of transparency. And until they give explicit guidance on the minimum bar, that is the extent of the legal mandate. If you do something meaningful to advance the dialogue with consumers, to clue them in on how and why you are using their data, you will be in a very defensible position. For the marketer, this is the ideal stage of the Directive's development. We have an objective to achieve (transparency to the consumer on data practices), and the freedom to experiment with multiple methods for achieving that objective.

And a creative marketer can think of all sorts of ways to fold transparency

into a strategic set of messages that further overall branding objectives. But this objective must be achieved in the next 6-12 months, before the ICO begins enforcing in the UK (deadline: May, 2012) and while the debates around consent standards across the rest of the EU are still subject to influence. If there's one clear message for the marketer, it's this: You have to find a way to take the data conversation directly to the consumer, so make sure you own the message while you still can. Here's a quick starter for your action plan:

## THE SCOPE IS WIDE ENOUGH TO IMPLICATE EVERY SITE AND EVERY AD DELIVERED IN THE EUROPEAN UNION.

**PRIVACY TEAM:** Convene an internal privacy team that includes a privacy expert (typically one with a CIPP credential), your legal expert responsible for advertising and privacy-related matters, the leader of your brand's website strategy, the leader of your online display media buying effort, and the lead person at your media buying advertising agency. Charge your new privacy team with designing and implementing an ePrivacy Directive response plan.

**AUDIT THE COOKIES:** Review those being set by you and your partners on your own website. Eliminate unnecessary cookies and implement new notices to consumers explaining what these cookies are for, who is setting them, and what their options are. Your advertising agency will play a key role here as they often manage the tracking code that enables cookies to be placed on a user's browser from your site and from your online display ads.

**MEDIA PARTNERS:** Do an audit of your media buying strategy and understand your partnerships, ad technology providers, and sources of 3rd party data. Be prepared to reveal these to consumers on your website.

**SELF-REGULATION:** Join the EU self-regulatory programme for behavioural advertising, operated by the IAB EU (<http://www.iabeurope.eu/news/self-regulation->

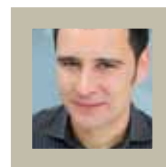
[framework.aspx](#)). While the scope of e-Privacy Directive goes beyond behavioural advertising, the programme is rallying behind a single icon that has had substantial traction in the US and is becoming the global standard for conveying the availability of information about data use to the consumer.

While you take these steps, look for opportunities to provide information to consumers that is specific and actionable, and provide tools that allow them to opt-out wherever practicable. All available data suggest consumers respond to transparency with increased trust and very low opt-out rates. The ICO emphasises the need for a "pragmatic" approach to complying with the law. Giving consumers the kind of transparency and control they deserve isn't at odds with an aggressive and successful online marketing strategy. Rather, it can become an advantage. Consumers already know that the ad industry relies on tracking and customisation. Taking the opportunity to explain your practices in clear terms will empower consumers and in the end help to build your brand.

Several of the largest internet companies doing business in the EU have already taken proactive steps to build new, highly visible cookie information features on their sites or their display advertising including the BBC, Google, Microsoft, and Yahoo. We expect hundreds of other web sites, brands, and networks to join them over the next six months. Collectively, the movement will reset consumer expectations for industry transparency. Icons leading to information about tracking including the 3rd parties responsible will become a regular feature of online ads. All of this is very good news for an industry that would rather build to its own specifications than be told what to do, but it also means that you are in competition with many other companies to own the dialogue. With many parties involved in the delivery of a single ad, you may be in competition with multiple companies in each of your ads.

This is the other commercial imperative. As an industry, we need to move before the policy is set against us. As individual companies, we also need to lay claim to our consumer relationships. Who should own that dialogue – the publisher, network, or advertiser? Does it depend on context?

If you are not at the table, you are going to get the scraps. So, take action now under your own terms, while you still can.



COLIN O'MALLEY is Chief Strategy Officer at Evidon. Contact: [www.evidon.com](http://www.evidon.com)